IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1398

JOEL SHIFFRIN, ET AL.,

Petitioners,

vs.

EARL BRATTON, ET AL.,

Respondents,

FIRST NATIONAL BANK OF HIGHLAND PARK, A NATIONAL BANKING ASSOCIATION,

Petitioner,

vs.

ROGER CHAPMAN AND JEANNE CHAPMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITIONERS REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

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Respondents seek to convince this Court that the issues are not as portrayed by Petitioner and that the decision of the Court below should not be reviewed because that Court

merely followed established precedent. The decision of the Court below, however, was an excursion into the unkown and creates dangerous precedent for other cases which may apply *Cort* v. *Ash*, 422 U. S. 66 (1975).

I.

Respondents do not address the issues with respect to the second, third and fourth *Cort* test. With reference to the second *Cort* test, Respondents state that the *expressio unius* doctrine is at best an aid to statutory construction, and an unreliable tool (Brief, p. 5), thereby ignoring *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975) ("SIPC"), and *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453 (1974) ("Amtrak"). As the sole basis for their argument, Respondents rely upon a section of the Federal Aviation Act ("Act") which requires supplemental air carriers to be bonded in order to operate. The Court below determined that Petitioner was an "indirect" supplemental air carrier (although that term is neither used nor defined in the Act or Regulations), and that inasmuch as Congress was concerned with the plight of uncompensated travelers, there was an indication "that if Congress did not expressly consider the issue of private enforcement of the Charter Regulations, nor did it intend to deny a remedy" (A. 26). Thus, the result reached by the Court below with reference to the second *Cort* test was erroneously based upon a lack of any evidence of congressional intent to deny a private remedy rather than "clear evidence" to create a private remedy.

With respect to the third *Cort* test, it is abundantly clear that the Court below did not correctly apply the test. Rather than reviewing the underlying purpose of the entire legislative scheme, the Court below merely reviewed the *statute* in question (A. p. 26). The cases cited by Petitioner clearly show that the legislative scheme of the Act is to provide safe and efficient air travel; *Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452 (3rd Cir. 1976), *Polansky* v. *Trans World Airlines, Inc.*, 523 F. 2d 332 (3rd Cir. 1975), *Wolf* v. *Trans World Airlines, Inc.*, 544 F. 2d 134 (3rd Cir. 1976) *cert. denied*, 420 U. S. 915 (1977).

With respect to the fourth *Cort* test, the Court below failed to follow *Cort* in not determining whether the issue was one which was traditionally relegated to state law. Instead, the Court below offered a new test, i.e., whether or not there is need for uniformity in the application of federal regulations. This modified test along with the alteration of the second and third *Cort* tests, effectively destroys the value and meaning of the *Cort* decision.

II.

On May 15, 1979, the Court decided *Cannon* v. *University of Chicago*, ... U. S. ....., 47 U. S. L. W. 4549 (1979).

Although *Cannon* implied a private remedy, the case is distinguishable. That case involved the basic issue as to whether the petitioner had an implied private right of action when Respondents violated § 901(a) of Title IX of the Education Amendments Act of 1972, in excluding her from participation in Respondent's medical education programs because of her sex, which programs were receiving federal financial assistance at the time of the exclusion.

It is significant that in speaking to the subject of an implied remedy, this Court, in *Cannon*, said:

> "As our recent cases—particularly *Cort* v. *Ash*, 422 U. S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, *a court must carefully analyze the four factors that Cort identifies as indicative of such an intent.*" (47 U. S. L. W. 4551.) (Emphasis supplied.)

This Court, upon review of the four *Cort* factors, was persuaded that the Petitioner had a statutory right to pursue the claim that Respondents rejected her application on the basis of her sex, and stated that *all* the circumstances that it had previously identified as supportive of an implied remedy were present (47 U. S. L. W. 4559).

In reaching this conclusion, this Court emphasizes that the drafters of Title IX eplicitly assumed, in 1972, when Title IX was enacted, that Title IX would be interpreted and applied as Title VI had been during the preceding eight years. Thus, when Title IX was enacted, the critical language of Title VI had already been construed as creating a private remedy (47 U. S. L. W. 4553). This Court then pointed out that Congressional representatives were aware of the prior interpretation of Title VI, and that such interpretation reflected their intent with respect to Title IX (47 U. S. L. W. 4554).

Also in this context, this Court also pointed out that Section 718 of the Education Amendments Act authorizes federal courts to award fees to prevailing parties, other than the United States, in private actions brought against local educational agencies, States, State agencies and the United States to enforce Title VI; that such provision explicitly preserves the availability of private suits to enforce Title VI (47 U. S. L. W. 4554); that Congress intended to create Title IX remedies comparable to those available under Title VI; and that Congress understood Title VI as authorizing an implied cause of action (47 U. S. L. W. 4555).

Thus, in *Cannon* the construction of Title IX in large part, is bottomed upon: the judicial construction of Title VI as creating a private remedy, prior to the enactment of Title IX; the awareness of Congress of such prior interpretation of Title VI; and Congress' intent that such interpretation be applicable to Title IX.

This Court concluded that implying a federal remedy in *Cannon* was not inappropriate since the subject matter did not involve an area basically of concern to the States; that the Federal Government and the Federal Courts have been the "primary and powerful reliance" in protecting citizens against discrimination of any sort, including that on the basis of sex; and, further, it is the expenditure of federal funds that provides the justification for the particular statutory prohibition (47 U. S. L. W. 4557).

The instant case involves no issue regarding primary national policy for which there is no adequate State law remedy. Application of the *Cort* principles to the instant case, when coupled with the existing agency enforcement mechanisms, mandates a reversal of the decision of the Court below.

III.

Contrary to Respondent's assertion, this case is ripe for review. The ruling in this case is fundamental to the further conduct of the case (*United States* v. *General Motor Corp.*, 323 U. S. 373, 377 (1945)).

There are three cases before this court in which appellate courts have implied a private cause of action and to which certiorari has been granted. *Redington* v. *Touche Ross & Co.*, 592 F. 2d 617 (2d Cir. 1978), *cert. granted* 439 U. S. 979 (1978), *Lewis* v. *Transamerica Corp.*, 575 F. 2d 237 (9th Cir. 1978), *cert. granted*, 439 U. S. 952 (1978), *Davis* v. *Southeastern Community College*, 574 F. 2d 1158 (4th Cir. 1978) *cert. granted*, 439 U. S. ..... (1979).

For the foregoing reasons and for the reasons stated in the Petition filed herein, this Court's writ should issue to the Court of Appeals for the Seventh Circuit and its decision reviewed and rectified.

Respectfully submitted,

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